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## USING RACKETEERING LAWS TO CONTROL OBSCENITY: *ALEXANDER V.* *UNITED STATES* AND THE PERVERSION OF RICO

*Our Constitution prefers to err on the side of protecting speech. It is better to leave a few of speech's noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.<sup>1</sup>*

You are the owner of a local bookstore, marveling at the enormous variety of titles you offer to your customers. You assume that you may place virtually any book you want on the shelves, motivated only by the dictates of the marketplace. After all, in the United States the Constitution protects citizens from government censorship of the books they read.<sup>2</sup>

What if you learned, however, that if a court determined that even two books of the thousands of titles in your bookstore were obscene, the Government could seize and destroy every book in your store and every book in any other store you own?<sup>3</sup> What if you also learned that you might lose nearly all of your personal assets and face a lengthy prison term? Finally, what if you learned that the definition of obscenity is so difficult to formulate, every community in the country has its own standard?<sup>4</sup> Confused and intimidated, you remove numerous titles from the shelves fearing that if even two books sold over a ten-year period violated your state's obscenity laws, you could lose your entire business and be sent to prison.

Unfortunately, this scenario is not an Orwellian nightmare; it is the reality in the United States today. In fact, after the United States Supreme Court's ruling in *Alexander v. United States*,<sup>5</sup> such a scenario could become commonplace. In *Alexander*, the Court upheld the post-trial forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") that mandate forfeiture of assets associated with a racketeering enterprise even in the context of an expressive

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<sup>1</sup> *Adult Video Ass'n v. Barr*, 960 F.2d 781, 792 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 113 S. Ct. 3028 (1993).

<sup>2</sup> See *Miller v. California*, 413 U.S. 15, 20 (1973).

<sup>3</sup> See 18 U.S.C. §§ 1961-1963 (1988).

<sup>4</sup> See *Miller*, 413 U.S. at 24.

<sup>5</sup> See *Alexander v. United States*, 113 S. Ct. 2766 (1993).

business such as a bookstore.<sup>6</sup> The Court decided that RICO's forfeiture provisions were subsequent punishments for criminal violations rather than unconstitutional prior restraints on speech.<sup>7</sup> The Court conceded that RICO's strict forfeiture provisions, when applied to an expressive business such as a bookstore, would lead to some self-censorship of constitutionally protected speech.<sup>8</sup> The Court concluded, however, that this self-censorship also would occur when a defendant faces severe prison sentences or fines.<sup>9</sup> Thus, RICO's forfeiture provisions, the Court noted, would not chill constitutionally protected speech any more than other criminal punishments and are constitutional.<sup>10</sup>

The Court also dismissed the argument that protected, non-obscene assets should be spared from RICO's forfeiture provisions.<sup>11</sup> The Court reasoned that non-obscene assets are subject to forfeiture not because of their expressive nature, but because they are related directly to a racketeering enterprise.<sup>12</sup> The Court, therefore, refused to carve out an exception to RICO when the racketeering enterprise is a business dealing in expressive materials.<sup>13</sup>

This Note examines the *Alexander* decision and argues that it was decided wrongly. By indulging in a formalistic analysis of RICO, the Court ignored the practical effect of the statute's forfeiture provisions and contradicted its own First Amendment jurisprudence. Section I provides background on RICO and its forfeiture provisions, and discusses the definition of "obscenity" and the First Amendment protection of sexually explicit expression.<sup>14</sup> Section II examines the First Amendment challenges to the federal RICO statute and its state counterparts.<sup>15</sup> Section III discusses *Alexander v. United States* in detail.<sup>16</sup> Finally, Section IV argues that the majority opinion's reasoning in *Alexander* is flawed, and proposes a limit on the scope of RICO forfeitures.<sup>17</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2773.

<sup>8</sup> *Id.* at 2774.

<sup>9</sup> *See id.*

<sup>10</sup> *See Alexander*, 113 S. Ct. at 2774.

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* at 2772.

<sup>13</sup> *Id.* at 2770-71.

<sup>14</sup> *See infra* notes 18-65 and accompanying text.

<sup>15</sup> *See infra* notes 66-177 and accompanying text.

<sup>16</sup> *See infra* notes 178-279 and accompanying text.

<sup>17</sup> *See infra* notes 280-336 and accompanying text.

## I. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

### A. RICO's History and Purpose

Congress enacted the Racketeer Influenced and Corrupt Organizations Act as Title IX of the Organized Crime Control Act of 1970, seeking to combat the infiltration of organized crime into legitimate business.<sup>18</sup> Congress's earlier attempts to combat organized crime had failed, partly because traditional criminal punishments of fines and imprisonment attack only the individuals involved in the crimes, and not the criminal enterprise itself.<sup>19</sup> RICO represented a new approach to the problem.<sup>20</sup> RICO penalties sought to destroy the criminal enterprise rather than merely sanction its replaceable members.<sup>21</sup>

To be criminally liable under RICO, the defendant must engage in a pattern of racketeering activity.<sup>22</sup> RICO defines racketeering activity as the commission of two or more predicate acts within a ten-year period.<sup>23</sup> These predicate acts are murder, kidnapping, perjury, extortion, arson, robbery, bribery, gambling and narcotics trafficking.<sup>24</sup> Congress added the violation of both federal and state obscenity laws to the list of predicate acts in a 1984 RICO amendment.<sup>25</sup> Members of Congress justified this addition by citing the proliferation of pornography and the involvement of organized crime in that industry.<sup>26</sup> Thus,

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<sup>18</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. §§ 1961-1968 (1988)); *Alexander*, 113 S. Ct. at 2777; John J. O'Donnell, Note, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 FORDHAM L. REV. 1101, 1104 (1988).

<sup>19</sup> See *Alexander*, 113 S. Ct. at 2777.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* The legislative history reads: "What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." *Id.*

<sup>22</sup> 18 U.S.C. § 1962.

<sup>23</sup> 18 U.S.C. § 1961(5) ("pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity").

<sup>24</sup> 18 U.S.C. § 1961(1) ("racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year"). RICO also includes a long list of predicate acts based on federal law. See *id.* These predicate acts fall within the general categories of murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity violations and drug offenses. *Id.*

<sup>25</sup> *Id.*; O'Donnell, *supra* note 18, at 1102.

<sup>26</sup> O'Donnell, *supra* note 18, at 1111-12. Congress's concerns subsequently were supported

an individual who commits two predicate acts within a ten-year period is engaging in a racketeering enterprise and falls under the purview of RICO.<sup>27</sup>

Once the Government establishes a pattern of racketeering activity by the commission of two predicate acts, RICO forbids the use of income from the racketeering activity to establish an enterprise engaged in interstate commerce or to conduct an enterprise engaged in interstate commerce through racketeering activity.<sup>28</sup> A defendant's conviction under one of these provisions triggers RICO's severe penalties.<sup>29</sup> RICO violations carry with them the traditional penalties such as a fine, a prison term of not more than twenty years, or both.<sup>30</sup>

The controversial penalties in the statute, however, are the mandatory forfeiture provisions, which provide that an individual convicted of engaging in a racketeering enterprise shall forfeit three groups of assets: any interest acquired through RICO violations; property that gives the defendant a source of influence over a racketeering enterprise; and any direct or indirect proceeds obtained from racketeering activity.<sup>31</sup> These forfeiture provisions represent new approaches Congress implemented to fight organized crime.<sup>32</sup> With these mandatory forfeiture provisions, Congress empowered federal and state officials to attack the economic base of racketeering enterprises in addition to imposing the traditional penalties of fines and imprisonment.<sup>33</sup>

RICO's forfeiture provisions are novel for more than their severity.<sup>34</sup> Most criminal forfeiture provisions are in rem forfeitures.<sup>35</sup> That is, the forfeited items themselves are said to be the "guilty party" and thus are legitimately forfeitable.<sup>36</sup> RICO forfeiture provisions, however, are in personam forfeitures because they impose penalties on the guilty individual.<sup>37</sup> As a result, the list of forfeitable assets is much greater because any of the individual's personal assets may be forfeited, as opposed to one specific rem.<sup>38</sup> For example, a job or salary can consti-

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by the Attorney General's Commission on Pornography which found a substantial involvement by organized crime in the adult entertainment industry. *Id.* at 1112.

<sup>27</sup> 18 U.S.C. § 1961.

<sup>28</sup> 18 U.S.C. § 1962.

<sup>29</sup> 18 U.S.C. § 1963.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see O'Donnell, *supra* note 18, at 1106.

<sup>32</sup> See Alexander, 113 S. Ct. at 2777.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at 2778.

<sup>35</sup> O'Donnell, *supra* note 18, at 1108.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 1108-09.

tute an in personam interest and therefore can be forfeitable under RICO.<sup>39</sup> A defendant's interest in a legitimate business used as part of a racketeering scheme also can be forfeited under RICO.<sup>40</sup> Neither penalty would be possible pursuant to an in rem forfeiture provision.<sup>41</sup> Thus, RICO's forfeiture provisions are an unusually powerful tool that allows the Government to prevent defendants from profiting from their crimes and to sever their connection with a racketeering enterprise.<sup>42</sup> In contrast, a conviction under an obscenity or nuisance statute would only result in the payment of a fine, a temporary closure, or an injunction against the underlying nuisance, yet would permit the enterprise to continue to exist.<sup>43</sup>

In sum, Congress enacted RICO as a tool to destroy racketeering enterprises by mandating forfeiture of a wide variety of assets associated with the corrupt organization.<sup>44</sup> A defendant who commits two of RICO's predicate acts becomes subject to the statute's penalties, which include unusually severe and sweeping mandatory forfeitures.<sup>45</sup> Because those forfeitures may be pursuant to obscenity violations, one of RICO's predicate acts, the statute implicates important First Amendment concerns.<sup>46</sup>

### B. *The First Amendment and Obscenity*

*I shall not today attempt further to define [obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.*<sup>47</sup>

The addition of obscenity to RICO's list of predicate acts implicates important First Amendment issues because expressive materials are constitutionally different from other racketeering materials, such as drug proceeds.<sup>48</sup> For example, if drug trafficking is the predicate act for a RICO conviction and the court orders the defendant to forfeit a yacht purchased with drug proceeds, the forfeiture does not implicate or infringe upon the defendant's First Amendment rights.<sup>49</sup> When

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<sup>39</sup> See *id.* at 1109.

<sup>40</sup> See O'Donnell, *supra* note 18, at 1109.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See Andrew J. Melnick, Note, A "Peep" at RICO: *Fort Wayne Books, Inc. v. Indiana and the Application of Anti-Racketeering Statutes to Obscenity Violations*, 69 B.U. L. Rev. 389, 396 (1989).

<sup>44</sup> *Alexander*, 113 S. Ct. at 2777.

<sup>45</sup> See *supra* notes 28-43 and accompanying text.

<sup>46</sup> See O'Donnell, *supra* note 18, at 1123.

<sup>47</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>48</sup> See *id.* at 1103; Melnick, *supra* note 43, at 424.

<sup>49</sup> See Melnick, *supra* note 43, at 425.

obscenity is the predicate act, however, the court may order forfeiture of the defendant's adult bookstore and its inventory of expressive materials.<sup>50</sup> In such a case, the bookstore owner's First Amendment rights of expression become entangled in the RICO violation.<sup>51</sup> Thus, an understanding of the relationship between the First Amendment and the protection of sexually explicit expression is important to understanding the First Amendment implications of RICO.<sup>52</sup>

Sexually explicit expression, or pornography, generally is protected by the First Amendment.<sup>53</sup> The Supreme Court has held, however, that obscenity, a subset of pornography, does not enjoy constitutional protection.<sup>54</sup> Obscenity is a term of art used to describe that subset of sexually explicit expression that depicts sexual activity in a patently offensive manner and lacks serious social value.<sup>55</sup>

Formulating a precise definition of obscenity has proven difficult for the Court.<sup>56</sup> The Supreme Court enunciated the current definition in 1973, in *Miller v. California*.<sup>57</sup> In *Miller*, the defendant mailed five unsolicited brochures advertising sexually explicit books to a restaurant in Newport Beach, California.<sup>58</sup> He was convicted of violating a California statute regulating the sale and distribution of obscene materials.<sup>59</sup> On appeal, however, the defendant challenged the California statute on First Amendment grounds.<sup>60</sup> The Supreme Court established that California had a legitimate interest in prohibiting the distribution of obscene materials that likely would offend unwilling recipients.<sup>61</sup> The Court stated that material is obscene if: (a) the average person, applying contemporary community standards, would find that the work appeals to the prurient interest; (b) the work depicts or describes sexual conduct in a patently offensive way; and (c) the work lacks serious literary, artistic, political or scientific value.<sup>62</sup> Any expression

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<sup>50</sup> See Ana Maria Marin, Note, *RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores*, 43 U. MIAMI L. REV. 419, 426 (1988).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See O'Donnell, *supra* note 18, at 1101.

<sup>54</sup> See *Miller v. California*, 413 U.S. 15, 23 (1973).

<sup>55</sup> See *id.* at 24.

<sup>56</sup> See *id.* at 37. The Court quoted Justice Stewart, in *Jacobellis v. Ohio*, who stated that in defining obscenity, the Court was "faced with the task of trying to define what may be indefinable." 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>57</sup> See *Miller*, 413 U.S. at 24; Marin, *supra* note 50, at 431.

<sup>58</sup> See *Miller*, 413 U.S. at 18.

<sup>59</sup> See *id.* at 17-18.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 18-19.

<sup>62</sup> *Id.* at 24.

that satisfies this definition falls outside of the scope of First Amendment protection, and thus may be regulated or even banned by state or federal governments.<sup>63</sup> Applying this standard, the Court held that the California statute did not violate the First Amendment.<sup>64</sup> Because violations of obscenity laws, which implicitly incorporate the *Miller* standard, are RICO predicate acts, the statute raises important First Amendment issues and has been challenged on constitutional grounds.<sup>65</sup>

## II. FIRST AMENDMENT CHALLENGES TO RICO

*A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.*<sup>66</sup>

### A. Prior Restraint, Overbreadth and Chilling Effect Challenges

First Amendment challenges to RICO typically fall into three categories.<sup>67</sup> RICO opponents argue that the statute's forfeiture provisions impose an unconstitutional prior restraint on protected speech, are unconstitutionally overbroad, and lead to an unconstitutional chilling effect on protected speech.<sup>68</sup> Prior restraints are government actions that suppress speech or other expression before the expression occurs.<sup>69</sup> The First Amendment prohibits the government from restricting expression before it takes place.<sup>70</sup> Subsequent punishments, however, are permissible penalties imposed after a judicial determination that one has engaged in unprotected speech.<sup>71</sup> Courts consider prior restraints to be a more serious First Amendment infringement than subsequent punishments because they prevent speech from even entering public discourse and thus increase the chance that the government will erroneously suppress protected speech.<sup>72</sup> Furthermore, because prior restraints prevent expression before a judge determines whether the expression merits protection, the adversarial system's protections are not present to prevent restraint of legitimate speech.<sup>73</sup>

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<sup>63</sup> *Miller*, 413 U.S. at 36-37.

<sup>64</sup> *Id.*

<sup>65</sup> See O'Donnell, *supra* note 18, at 1123.

<sup>66</sup> See Melnick, *supra* note 43, at 418.

<sup>67</sup> See *infra* notes 68-93 and accompanying text.

<sup>68</sup> *Alexander v. United States*, 113 S. Ct. 2766, 2770 (1993).

<sup>69</sup> See Melnick, *supra* note 43, at 417-18.

<sup>70</sup> See O'Donnell, *supra* note 18, at 1112.

<sup>71</sup> See *id.* at 1113-14.

<sup>72</sup> See Melnick, *supra* note 43, at 418.

<sup>73</sup> O'Donnell, *supra* note 18, at 1114.



Finally, prior restraints make analysis of the true impact of the expression impossible because it has not yet occurred.<sup>74</sup> Thus, a prior restraint prevents speech without assessing the public's reaction to that speech.<sup>75</sup> For these reasons, there exists a strong presumption against the validity of any prior restraint.<sup>76</sup>

RICO's opponents use the prior restraint doctrine to attack the statute's forfeiture provisions by arguing that those provisions require forfeiture of expressive materials before a court has adjudged the materials to be obscene.<sup>77</sup> In other words, when the predicate act is an obscenity violation, a court may order forfeiture of an entire expressive business when the court has adjudged only a small portion of that business to be obscene.<sup>78</sup> Such a penalty serves as a prior restraint because a court has ordered the forfeiture of expressive materials only because of their association with obscene materials, not because they have been adjudged obscene.<sup>79</sup>

The overbreadth doctrine is based on the First Amendment and invalidates a statute which because of its breadth restricts constitutionally protected speech, press and assembly, in addition to legitimately proscribed expression.<sup>80</sup> Under the doctrine, a statute may be invalidated if it is fairly capable of being applied to punish someone for constitutionally protected speech or conduct.<sup>81</sup> The doctrine also allows a party to attack a statute, not on the ground that it is unconstitutional as enforced against that party, but on the ground that the statute's application to a third party not before the court violates the First Amendment.<sup>82</sup> The extreme importance of free expression in our society justifies an exception to the rule that the constitutionality of a statute must be tested against the conduct of the party before the court.<sup>83</sup> Another justification for the exception is that individuals whose activities may violate the statute will be reluctant to challenge it, and thus draw attention to themselves and risk criminal prosecution under the very statute they wish to challenge.<sup>84</sup> RICO's opponents use the

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Melnick, *supra* note 43, at 418.

<sup>77</sup> See Marin, *supra* note 50, at 438; O'Donnell, *supra* note 18, at 1112-13.

<sup>78</sup> See Marin, *supra* note 50, at 426.

<sup>79</sup> *Id.*

<sup>80</sup> BLACK'S LAW DICTIONARY 1103 (6th ed. 1990).

<sup>81</sup> *Id.*

<sup>82</sup> *Adult Video Ass'n v. Barr*, 960 F.2d 781, 787 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 113 S. Ct. 3028 (1993).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

overbreadth doctrine to argue that the statute's forfeiture provisions impermissibly stifle constitutionally protected, sexually explicit speech.<sup>85</sup> They argue that because of the statute's breadth, the Government can never use it legitimately to punish obscenity because any resulting forfeiture would represent an unconstitutional prior restraint.<sup>86</sup>

The chilling effect argument contends that a statute is invalid because of its indirect restrictions on protected speech.<sup>87</sup> Its proponents argue that a statute's severe penalties will induce individuals involved in expressive businesses to censor themselves to avoid violating the law and suffering its sanctions.<sup>88</sup> Thus, the indirect effect of the statute is to chill improperly First Amendment freedoms.<sup>89</sup> Proponents use the chilling effect argument against the indirect impact of RICO's forfeiture penalties.<sup>90</sup> They argue that the specter of severe forfeitures will induce individuals involved in selling sexually explicit materials to censor themselves.<sup>91</sup> These businesses, proponents reason, will remove expressive materials otherwise protected by the First Amendment because they fear the draconian RICO forfeiture provisions.<sup>92</sup> As a result, RICO's effect is to chill the exercise of those individuals' First Amendment rights, albeit indirectly.<sup>93</sup>

#### B. Case History Before *Alexander v. United States*

In 1931, the United States Supreme Court decided the seminal case dealing with the prior restraint doctrine: *Near v. Minnesota ex. rel. Olson*.<sup>94</sup> In *Near*, the Supreme Court broadened the doctrine of prior restraint to include not only systems that require governmental pre-approval before the dissemination of speech, but also injunctions against future speech.<sup>95</sup> The case involved a Minnesota statute providing for the judicial abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical."<sup>96</sup> A county attorney brought an action under the statute to enjoin the

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 59 (1989).

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 60.

<sup>92</sup> *Fort Wayne Books*, 489 U.S. at 60.

<sup>93</sup> See *id.* at 59.

<sup>94</sup> 283 U.S. 697, 723 (1931); see *Alexander v. United States*, 113 S. Ct. 2766, 2781 (1993).

<sup>95</sup> *Alexander*, 113 S. Ct. at 2773 n.2; *Near*, 283 U.S. at 722-23.

<sup>96</sup> *Near*, 283 U.S. at 701-02.

defendant's publication of *The Saturday Press*.<sup>97</sup> The complaint alleged that the defendants published numerous editions of *The Saturday Press* "largely devoted to malicious, scandalous and defamatory articles."<sup>98</sup> The articles contained charges that a Jewish gangster controlled gambling, bootlegging and racketeering in Minneapolis, and that law enforcement officials were derelict in performing their duties.<sup>99</sup> The trial court in *Near* forbade the defendants from publishing, circulating or possessing any edition of *The Saturday Press*.<sup>100</sup> The Supreme Court, however, determined that freedom of the press should prevent prior restraints on publication.<sup>101</sup> The Court rejected the argument that the Minnesota statute, which permits prior restraints, was constitutional merely because those restraints would be lifted if a publisher could demonstrate that the articles in question were in fact true and published with good motives.<sup>102</sup> The Court therefore struck down the Minnesota statute as an impermissible prior restraint.<sup>103</sup>

In 1963, in *Bantam Books, Inc. v. Sullivan*, the Supreme Court struck down, as an unconstitutional prior restraint, a statute that empowered a Rhode Island state commission to warn book sellers that certain titles in their inventory might be obscene, thus implying that criminal prosecution could follow if the sellers did not remove the titles.<sup>104</sup> Although the commission could not enforce its warnings, and failure to heed them did not constitute a criminal offense, the Court invalidated the statute as an impermissible prior administrative restraint.<sup>105</sup> The Court stated that it would look through form to the substance of the law and recognize that even informal censorship may stifle speech sufficiently to warrant injunctive relief.<sup>106</sup> The Court noted that although the commission had no enforcement power, its activities ultimately would suppress publications it determined objectionable.<sup>107</sup> The Court held, therefore, that even this form of informal censorship, when evaluated by its impact on free speech, was unconstitutional.<sup>108</sup>

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<sup>97</sup> *Id.* at 703.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 704.

<sup>100</sup> *Id.* at 704-05.

<sup>101</sup> *Near*, 283 U.S. at 713.

<sup>102</sup> *Id.* at 721.

<sup>103</sup> *Id.* at 722-23.

<sup>104</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61, 68-71 (1963).

<sup>105</sup> *Id.* at 68, 71.

<sup>106</sup> *Id.* at 67.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 71.

In 1980, in *Vance v. Universal Amusement Co.*, the United States Supreme Court dealt with the issue of prior restraint in the context of sexually explicit expression.<sup>109</sup> *Vance* involved two Texas nuisance statutes under which a court could enjoin indefinitely a theater's showing of non-obscene films upon Government demonstration that obscene films had been shown at the same theater.<sup>110</sup> In striking down the statutes, the Supreme Court stated that regulation of communicative activity, like films, requires more narrowly drawn procedures than those used to abate an ordinary nuisance.<sup>111</sup> The Court reasoned that the prior restraint authorized by the Texas statutes was more onerous and objectionable than the threat of criminal sanctions following the exhibition of the film.<sup>112</sup> In a criminal trial, the Court noted, the defendant may argue that the film shown was not obscene.<sup>113</sup> This defense is obviously not available in the case of a prior restraint authorized by the statutes in question.<sup>114</sup> Thus, the Court struck down the statutes as impermissible prior restraints.<sup>115</sup>

The first case ruling on the validity of the federal RICO forfeiture provisions with respect to obscenity violations was *United States v. Pryba*, decided in 1990.<sup>116</sup> In *Pryba*, the United States Court of Appeals for the Fourth Circuit rejected a prior restraint and chilling effect argument made by the defendants, who owned nine video rental stores and three bookstores.<sup>117</sup> At trial, the defendants were convicted of several offenses, including RICO violations, related to the sale of obscene video tapes and magazines.<sup>118</sup> In addition to fines and jail terms for the obscenity violations, the court ordered the defendants to forfeit their entire interest in twelve businesses, along with corporate assets, real estate and motor vehicles.<sup>119</sup> The businesses' sales during the year the violations took place exceeded \$2 million.<sup>120</sup> The total value of the obscene materials was \$105.30.<sup>121</sup>

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<sup>109</sup> *Vance v. Universal Amusement Co.*, 445 U.S. 308, 314-15 (1980).

<sup>110</sup> *Alexander*, 113 S. Ct. at 2771; *Vance*, 445 U.S. at 310 nn.1-2;

<sup>111</sup> *Vance*, 445 U.S. at 315.

<sup>112</sup> *Id.* at 316.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 316.

<sup>115</sup> *Id.*

<sup>116</sup> 900 F.2d 748, 753 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990).

<sup>117</sup> *Id.* at 750.

<sup>118</sup> *Id.* The jury found six magazines and four video tapes that had been rented or purchased to be obscene. *Id.*

<sup>119</sup> *Id.* at 752.

<sup>120</sup> *Id.* at 753.

<sup>121</sup> *Pryba*, 900 F.2d at 753.

The defendants appealed the convictions and forfeiture orders to the Fourth Circuit, arguing that RICO's forfeiture provisions violated the First Amendment when the predicate acts were obscenity violations.<sup>122</sup> Specifically, the defendants asserted that the forfeiture provisions represented an unconstitutional prior restraint and had a chilling effect on constitutionally protected speech.<sup>123</sup> Rejecting these arguments, the Fourth Circuit noted the absence of constitutional protection for obscene materials and held that RICO's forfeiture provisions did not violate the First Amendment even though some forfeited materials may not be obscene.<sup>124</sup> The Fourth Circuit determined that the Government established a nexus between those protected materials and the defendant's illegal, obscene assets.<sup>125</sup> The court stated that as long as the defendants acquired the forfeited materials in violation of RICO, the materials may be constitutionally forfeited in accordance with the statute's procedures.<sup>126</sup> To accept the defendants' argument, the court reasoned, would allow criminals to shelter their illegal profits by investing them in expressive businesses like newspapers.<sup>127</sup>

With respect to the defendants' chilling effect argument, the court stated that a chilling effect does not make a forfeiture unconstitutional.<sup>128</sup> The Fourth Circuit noted that despite the chilling effect of both large fines and prison terms, the defendants did not argue that fines and imprisonment were unconstitutional.<sup>129</sup> The court reasoned that the defendants faced thirty-five years in prison and a fine of \$1.75 million even without RICO's forfeiture provisions.<sup>130</sup> This penalty, the court predicted, would destroy the defendants' business and consequently chill their right to sell presumptively protected speech.<sup>131</sup> This result, however, did not make the prison sentence and fine unconstitutional.<sup>132</sup> This same reasoning, the Fourth Circuit concluded, applied to RICO's forfeiture provisions.<sup>133</sup>

In 1992, in *Adult Video Association v. Barr*, the United States Court of Appeals for the Ninth Circuit also addressed the validity of the

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 753, 755.

<sup>125</sup> *Id.* at 755.

<sup>126</sup> *Pryba*, 900 F.2d at 756.

<sup>127</sup> *Id.* at 755.

<sup>128</sup> *Id.* at 756.

<sup>129</sup> *See id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Pryba*, 900 F.2d at 756.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

federal RICO statute's post-trial forfeiture provisions.<sup>134</sup> The Ninth Circuit determined that the federal RICO statute's post-trial forfeiture provisions did not constitute prior restraints on expression.<sup>135</sup> Nevertheless, the court held that those provisions were unconstitutional.<sup>136</sup>

In *Barr*, the Adult Video Association sought a declaration that RICO's criminal provisions were facially unconstitutional when enforced against obscenity offenses.<sup>137</sup> Adult Video asserted that RICO's post-trial forfeiture provisions amounted to an unconstitutional prior restraint on speech and that RICO's severe penalties, combined with the amorphous definition of obscenity, unconstitutionally chilled protected, sexually explicit speech.<sup>138</sup> The court dismissed the defendant's prior restraint argument noting that RICO forfeitures occur only after a judicial determination of obscenity is made in a criminal trial.<sup>139</sup> The court also reasoned that the forfeitures do not permanently silence defendants because they remain free to sell books at another location.<sup>140</sup>

Although the court would not characterize the post-trial forfeiture provisions as prior restraints, it did conclude that the scope of RICO's post-trial forfeiture provisions must be tailored to harmonize with the First Amendment.<sup>141</sup> The Ninth Circuit characterized RICO's forfeiture provisions as "extremely broad" and noted the accepted doctrine that criminal rules must be narrowly drawn when they operate in the First Amendment area.<sup>142</sup> Because RICO's forfeiture provisions reached nearly every asset remotely connected with the offense and were not limited to assets tainted by use in the racketeering activity, the court held that the statute's forfeiture provisions violated the First Amendment.<sup>143</sup> The *Barr* court then modified the forfeiture provisions to bring them within the First Amendment.<sup>144</sup> The court determined that the defendant's assets relating to legitimate expressive activity, generated by parts of the business not involved, or only marginally involved, in the racket-

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<sup>134</sup> *Adult Video Ass'n v. Barr*, 960 F.2d 781, 783 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 113 S. Ct. 3028 (1993) (case was remanded to the Ninth Circuit for further consideration in light of *Alexander v. United States*).

<sup>135</sup> *Id.* at 791.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 783.

<sup>138</sup> *Id.* at 784.

<sup>139</sup> *See Barr*, 960 F.2d at 784.

<sup>140</sup> *Id.* at 790.

<sup>141</sup> *Id.* at 788-89.

<sup>142</sup> *Id.* at 790.

<sup>143</sup> *Id.* at 790, 792.

<sup>144</sup> *Barr*, 960 F.2d at 792.

earing activity, should not be forfeited.<sup>145</sup> The Ninth Circuit stated that a court should not, absent exceptional circumstances, "order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income."<sup>146</sup>

The *Barr* court noted that this modification acknowledges that in obscenity cases, unlike traditional RICO cases, a concern for protecting the public's rights to purchase, and the defendant's right to sell, protected speech demands a more delicate approach to forfeitures.<sup>147</sup> The Ninth Circuit reasoned that forfeitures of assets derived from murder or fraud rarely implicate the public's access to information.<sup>148</sup> The forfeiture of assets only loosely related to obscenity offenses, however, harms both the defendant and the members of the public who desire to purchase sexually explicit materials.<sup>149</sup>

The *Barr* court next turned to the chilling effect argument.<sup>150</sup> The court conceded that the severe RICO penalties could induce some self-censorship.<sup>151</sup> It noted, however, that deterring the sale of obscenity is a legitimate goal of state anti-obscenity laws and that any obscenity statute will promote some self-censorship.<sup>152</sup> In sum, although the *Barr* court rejected the defendant's chilling effect and prior restraint arguments, it held that RICO's extremely broad forfeiture provisions violated the First Amendment.<sup>153</sup> Accordingly, the court stated that RICO forfeitures of expressive assets should only take place if those assets are an important part of the racketeering enterprise.<sup>154</sup>

While the *Barr* and *Pryba* courts dealt with the constitutionality of the federal RICO statute, the Supreme Court in 1989, in *Fort Wayne Books v. Indiana*, held that the Indiana state RICO statute, which was nearly identical to the federal statute, contained unconstitutional pre-trial seizure provisions.<sup>155</sup> In *Fort Wayne Books*, the defendants operated

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<sup>145</sup> *Id.* at 791.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 792.

<sup>148</sup> *Id.*

<sup>149</sup> *Barr*, 960 F.2d at 792.

<sup>150</sup> *Id.* at 786.

<sup>151</sup> *Id.* at 786-87.

<sup>152</sup> *Id.* at 787.

<sup>153</sup> *Id.* at 791.

<sup>154</sup> *Barr*, 960 F.2d at 791.

<sup>155</sup> See 489 U.S. 46, 65 (1989); *supra* notes 116, 134 and accompanying text; Melnick, *supra* note 43, at 389 n.4.

several adult bookstores in Indiana.<sup>156</sup> The State of Indiana filed civil actions against the defendants alleging that they violated the state anti-obscenity laws and thereby violated the state RICO law.<sup>157</sup> A trial court entered an order finding that probable cause existed to conclude that Fort Wayne Books was violating the state RICO law, and ordered an immediate seizure of the defendant's real estate, publications and other personal property.<sup>158</sup> The stores were padlocked and their contents were confiscated by the State.<sup>159</sup> The Indiana court never set a trial date for the RICO charges.<sup>160</sup>

The Supreme Court rejected the defendants' argument that RICO's forfeiture provisions lead to an unconstitutional chilling effect when obscenity violations are the predicate acts.<sup>161</sup> The Court conceded that RICO punishments are greater than those for obscenity violations, yet found no constitutionally significant difference between the two.<sup>162</sup> The Court also conceded that the severe RICO penalties would lead to some self-censorship.<sup>163</sup> The Court reasoned, however, that a state may attempt to deter obscenity and that any criminal obscenity statute applicable to a bookseller will induce some self-censorship.<sup>164</sup> The mere assertion, therefore, of some self-censorship resulting from an anti-obscenity statute, the Court concluded, is insufficient to render it unconstitutional.<sup>165</sup>

The Supreme Court conceded that rigorous procedural safeguards must be employed before expressive materials can be seized as obscene.<sup>166</sup> The Court also noted that prior to a judicial determination of obscenity in an adversary proceeding, a state could not restrain the showing of a film by seizing all copies of it.<sup>167</sup> The Court held that the pretrial seizures in this case were unconstitutional in the absence of a judicial determination that the seized items were obscene or that RICO violations had occurred.<sup>168</sup> The Court noted that the seizure hearing established no more than probable cause to believe that a RICO viola-

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<sup>156</sup> *Fort Wayne Books*, 489 U.S. at 50.

<sup>157</sup> *Id.* at 50-51.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 52.

<sup>161</sup> *Fort Wayne Books*, 489 U.S. at 59.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 60.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Fort Wayne Books*, 489 U.S. at 62.

<sup>167</sup> *Id.* at 63.

<sup>168</sup> *Id.* at 65-66.



tion had occurred.<sup>169</sup> This standard of proof, the Court held, is insufficient to remove books or films from circulation.<sup>170</sup> The Court, therefore, reversed the pretrial seizure of thousands of the defendants' books and films.<sup>171</sup>

In the four years preceding the *Alexander* decision, the *Pryba*, *Barr* and *Fort Wayne Books* decisions provided the controlling law on state and federal RICO forfeiture provisions.<sup>172</sup> The Fourth Circuit in *Pryba* upheld the validity of the federal RICO forfeiture provisions in which obscenity violations were the predicate acts.<sup>173</sup> The Ninth Circuit in *Barr* held RICO's post-trial forfeiture provisions unconstitutional as applied in that case and narrowed the forfeiture provisions to harmonize them with the First Amendment.<sup>174</sup> The Supreme Court in *Fort Wayne Books* struck down a state RICO statute's pre-trial forfeiture provisions.<sup>175</sup> The Supreme Court, however, had never evaluated the federal RICO statute's post-trial forfeiture provisions.<sup>176</sup> It was to this issue that the Court turned its attention in *Alexander v. United States*.<sup>177</sup>

### III. ALEXANDER V. UNITED STATES

In June 1993, the United States Supreme Court, in *Alexander v. United States*, ruled on the constitutionality of the federal RICO statute's post-trial forfeiture provisions.<sup>178</sup> In a five-to-four decision, the Court upheld an Eighth Circuit ruling that RICO's post-trial forfeiture provisions do not violate a defendant's First Amendment rights.<sup>179</sup> The majority opinion, written by Chief Justice Rehnquist, rejected Ferris Alexander's argument that RICO unconstitutionally criminalized non-obscene expressive materials.<sup>180</sup> The majority determined that RICO's forfeiture provisions were subsequent punishments for criminal violations and were oblivious to the expressive or non-expressive nature of the forfeited property.<sup>181</sup>

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<sup>169</sup> *Id.* at 66.

<sup>170</sup> *Id.*

<sup>171</sup> *Fort Wayne Books*, 489 U.S. at 67.

<sup>172</sup> *See id.*; *Barr*, 960 F.2d at 92; *Pryba*, 900 F.2d at 753.

<sup>173</sup> *Pryba*, 900 F.2d at 756.

<sup>174</sup> *Barr*, 960 F.2d at 92.

<sup>175</sup> *Fort Wayne Books*, 489 U.S. at 67.

<sup>176</sup> *See* Melnick, *supra* note 43, at 391.

<sup>177</sup> *See* 113 S. Ct. 2766, 2769 (1993).

<sup>178</sup> *See id.* at 2776.

<sup>179</sup> *Id.* The Court remanded the case for analysis of whether the forfeiture served as a cruel and unusual punishment in violation of Alexander's Eighth Amendment rights. *Id.*

<sup>180</sup> *Id.* at 2770-71.

<sup>181</sup> *See id.* at 2772.

Ferris Alexander was involved in the adult entertainment industry for more than thirty years.<sup>182</sup> His enterprise encompassed more than a dozen stores and theaters dealing in sexually explicit materials.<sup>183</sup> His business included selling magazines, showing movies, and selling and leasing video cassettes.<sup>184</sup> Alexander would receive inventory shipments at a warehouse in Minneapolis where they were wrapped in plastic, priced, boxed and transported to his various retail outlets in Minnesota.<sup>185</sup>

In 1989, federal authorities filed a forty-one count indictment against Alexander, including thirty-four obscenity violations and three RICO counts.<sup>186</sup> After a four-month trial, the jury determined that four magazines and three video tapes sold in Alexander's stores were obscene.<sup>187</sup> The jury convicted Alexander of obscenity and RICO violations.<sup>188</sup>

The district court sentenced Alexander to a prison term of between thirty-six and seventy-two months.<sup>189</sup> The court also fined Alexander \$100,950 and ordered him to pay the costs of his imprisonment, his supervised release and the prosecution of the case.<sup>190</sup> Pursuant to RICO's forfeiture provisions, the court ordered forfeiture of Alexander's interest in ten pieces of commercial real estate that afforded Alexander a source of influence over the racketeering enterprise and that he acquired through proceeds from the racketeering activity.<sup>191</sup> Alexander also forfeited personal property, his interest in a wholesale business, thirteen retail businesses that he used in the racketeering

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<sup>182</sup> *Alexander v. United States*, 943 F.2d 825, 827 (8th Cir. 1991), *aff'd in part and remanded in part*, 113 S. Ct. 2766, 2776 (1993).

<sup>183</sup> *Alexander*, 113 S. Ct. at 2769.

<sup>184</sup> *Alexander*, 943 F.2d at 827.

<sup>185</sup> *Alexander*, 113 S. Ct. at 2769.

<sup>186</sup> *Id.* The obscenity counts were the predicate acts for the RICO counts. *Id.* In addition to the obscenity counts and RICO violations, Alexander was charged with conspiracy to defraud the IRS and tax evasion. *Alexander*, 943 F.2d at 827 n.1. Alexander was convicted on one count of conspiracy to defraud the United States by impeding the lawful function of the IRS; two counts of filing false income tax returns; three counts of violating RICO, 18 U.S.C. § 1962; twelve counts of knowingly transporting obscene material in interstate commerce for the purpose of sale or distribution; five counts of engaging in the business of selling or transferring obscene materials; and one count of falsely misrepresenting a social security number for the purpose of impeding the IRS. *Id.*

<sup>187</sup> *Alexander*, 113 S. Ct. at 2770. The Court did not describe the content of the videos or magazines except to note that they depicted "hard core" sexual acts. *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Alexander*, 943 F.2d at 829.

<sup>190</sup> *Id.* The court ordered Alexander to pay the costs of his imprisonment (\$1,415.56 per month), his supervised release (\$96.66 per month) and the costs of prosecution (\$29,737.84). *Id.*

<sup>191</sup> *Id.*

enterprise and \$8,910,548.10 that he acquired from the racketeering activity.<sup>192</sup>

Alexander appealed to the Eighth Circuit arguing, *inter alia*, that the district court's application of RICO forfeitures unconstitutionally criminalized non-obscene expressive material.<sup>193</sup> He argued that sexually explicit materials are not obscene until an adversarial judicial proceeding deems them to be.<sup>194</sup> Furthermore, Alexander argued that a court, in an adversarial proceeding, must determine that each expressive item is obscene before that item may be forfeited.<sup>195</sup>

The Eighth Circuit dismissed most of Alexander's arguments and reasoned that the RICO forfeiture provisions did not violate the First Amendment even though certain forfeited expressive materials were not obscene and therefore would be constitutionally protected speech in another setting.<sup>196</sup> The court justified this holding by noting the nexus between the defendant's illegal gains from racketeering activities and the protected materials that he forfeited.<sup>197</sup> Furthermore, according to the court, the forfeitures did not occur until after the defendant's conviction of criminal violations and after the Government established that the defendant had used the proceeds from these criminal activities to acquire the protected materials.<sup>198</sup> The Eighth Circuit, therefore, held that forfeiture of non-obscene expressive materials does not violate the First Amendment if forfeiture occurs subsequent to a RICO violation predicated on obscenity convictions and a determination that the forfeited materials gave the defendants a source of influence over the racketeering enterprise.<sup>199</sup> If RICO's procedures are followed, the court stated, the forfeiture of non-obscene expressive materials is constitutional.<sup>200</sup>

In a five-to-four decision, the United States Supreme Court upheld the Eighth Circuit.<sup>201</sup> The majority opinion, written by Chief Justice

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 832.

<sup>194</sup> *Alexander*, 943 F.2d at 832. *Alexander* stated that the *Miller* test for obscenity must be applied to all material the Government seeks to restrain. *Id.* See *supra* notes 57-65 and accompanying text for a discussion of *Miller*. *Alexander* relied on *Vance* to support his argument. *Alexander*, 943 F.2d at 832. See *supra* notes 109-15 and accompanying text for a discussion of *Vance*.

<sup>195</sup> *Alexander*, 943 F.2d at 832.

<sup>196</sup> *Id.* at 833.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See *Alexander*, 943 F.2d at 833.

<sup>201</sup> *Alexander*, 113 S. Ct. at 2769.

Rehnquist and joined by Justices White, O'Connor, Scalia and Thomas, evaluated and rejected each of Alexander's First Amendment challenges to RICO.<sup>202</sup> The Court decided that RICO's post-trial forfeiture provisions were valid subsequent punishments for criminal violations and not unconstitutional prior restraints on speech.<sup>203</sup>

The Court rejected Alexander's claim that RICO's forfeiture provisions, when applied to obscenity violations, constitute an unconstitutional prior restraint on speech.<sup>204</sup> The Court dismissed the argument that because such a forfeiture prohibits future presumptively protected speech in retaliation for prior unprotected speech, it constitutes a prior restraint on that protected speech.<sup>205</sup> The Court reasoned that to accept Alexander's argument that a post-trial forfeiture resembles an injunction enjoining future speech would destroy the important distinction between prior restraint and subsequent punishment.<sup>206</sup>

The Court contrasted unconstitutional prior restraints with the RICO forfeiture order that neither forbade Alexander from engaging in expressive activity in the future, nor required him to obtain prior approval for expressive activities.<sup>207</sup> Rather, according to the Court, the forfeiture merely deprived Alexander of assets that were related to his previous racketeering violations.<sup>208</sup> Alexander could open new adult entertainment stores any time he liked, the Court maintained, without being in contempt for violating a court order.<sup>209</sup> Thus, the forfeiture order imposed no legal restriction on Alexander's ability to engage in any expressive activity.<sup>210</sup> As a result, the Court concluded, RICO's forfeiture provisions do not represent a form of prior restraint, but rather serve as a subsequent punishment for the defendant's criminal violations.<sup>211</sup>

The Court noted that the Government's constitutional violation in most prior restraint cases has been its seizure of suspected obscene materials prior to judicial determination that they were in fact ob-

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<sup>202</sup> *Id.* Justice Souter concurred in the judgment but joined part of Justice Kennedy's dissent. *Id.* at 2776.

<sup>203</sup> *See id.* at 2770-71.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Alexander*, 113 S. Ct. at 2771. The Court defined a prior restraint as an administrative or judicial order forbidding certain communications when issued in advance of the time that those communications are to occur. *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See Alexander*, 113 S. Ct. at 2771-72.

scene.<sup>212</sup> Here, however, Alexander forfeited the protected expressive materials not because they were suspected of being obscene, but because they were directly related to his racketeering violations.<sup>213</sup> RICO, the Court noted, mandates the forfeiture of assets because of their financial role in the racketeering enterprise.<sup>214</sup> The statute is oblivious to the expressive or non-expressive nature of those assets.<sup>215</sup> The Court also noted that the Government gave Alexander the requisite procedural safeguards that had been missing in some earlier prior restraint cases.<sup>216</sup> In particular, Alexander received a full criminal trial in which the Government established beyond a reasonable doubt both that some materials were obscene and that the other forfeited assets were linked directly to the racketeering offenses.<sup>217</sup>

Finally, the Court stated that accepting Alexander's argument would destroy the "time honored distinction" between prior restraint and subsequent punishment.<sup>218</sup> Because the Court previously interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments, the Court stated that it must be able to distinguish the two concepts to know what level of constitutional protection is appropriate.<sup>219</sup> Therefore, the distinction between subsequent punishments and prior restraints must be somewhat precise.<sup>220</sup> Accepting Alexander's argument, it stated, would make the two concepts indistinguishable.<sup>221</sup> The Court concluded that the

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 2772.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* The Court noted that if this were not the case, racketeers could evade forfeiture by investing the proceeds of their crimes in businesses engaged in expressive activity. *Id.*

<sup>216</sup> *Alexander*, 113 S. Ct. at 2772. The Court discussed *Fort Wayne Books* in which it rejected the pretrial seizure of expressive material based upon a finding only that probable cause existed to believe a RICO violation had occurred. *Id.* The Court emphasized that the lack of prior judicial determination that the materials were obscene or that RICO violations had occurred made the seizures in *Fort Wayne Books* unconstitutional. *Id.*

<sup>217</sup> *Id.* The Court also stated that Alexander's prior restraint argument was inconsistent with its 1986 ruling in *Arcara v. Cloud Books, Inc.* *Id.* In *Arcara*, the Court sustained a lower court order, issued pursuant to a nuisance statute, that closed down an adult bookstore being used as a place of prostitution. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698, 707 (1986). The Court rejected a prior restraint argument in *Arcara* for two reasons. *Id.* at 705 n.2. First, the defendants could sell books at another location. *Id.* Second, the closure order was not based on expressive conduct but on the prostitution conducted on the premises. *Id.* The *Alexander* Court found that reasoning directly applicable to Alexander and therefore concluded that the RICO forfeiture was not a prior restraint on speech but a punishment for criminal conduct. 113 S. Ct. at 2772.

<sup>218</sup> See *Alexander*, 113 S. Ct. at 2773.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

First Amendment prohibits neither stringent criminal penalties for obscenity offenses nor forfeiture of expressive materials as punishment for criminal conduct.<sup>222</sup>

The Court also rejected Alexander's claim that RICO forfeiture provisions are constitutionally overbroad because they are not limited to obscene materials and the proceeds from the sale of those materials.<sup>223</sup> The Court noted that RICO does not criminalize constitutionally protected speech and therefore materially differs from the statutes in overbreadth cases.<sup>224</sup> Alexander's real complaint, the Court asserted, is not that RICO's forfeiture provisions are overbroad, but that applying them to expressive businesses may have an improper chilling effect on free expression.<sup>225</sup> The Court conceded that RICO's stringent forfeiture provisions may cause some booksellers to censor themselves and remove marginally protected materials from their shelves.<sup>226</sup> The Court concluded, however, that RICO's forfeiture provisions would have no more of a chilling effect on free expression than a prison sentence or large fine.<sup>227</sup> For example, each racketeering charge carries a maximum penalty of twenty years in prison, a sentence the Court maintained would cause more self-censorship than a forfeiture.<sup>228</sup> Following its determination in *Fort Wayne Books* that RICO's fines and prison terms did not violate the First Amendment, the Court reasoned by extension that the post-trial forfeiture provisions similarly were constitutional.<sup>229</sup>

Alexander also argued that the Court should evaluate RICO's forfeiture provisions differently in cases where the predicate acts are obscenity violations.<sup>230</sup> The Court rejected this argument, relying on decisions holding that criminal and civil sanctions that incidentally

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<sup>222</sup> *Id.*

<sup>223</sup> *Alexander*, 113 S. Ct. at 2774.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* The defendant made this same argument in *Fort Wayne Books* and the Court rejected it. *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Alexander*, 113 S. Ct. at 2774.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* Alexander was attempting to distinguish the Court's ruling in *Arcara*. *Id.* In that case, the Court rejected a First Amendment challenge to a court order closing an entire business that was engaged in expressive activity as punishment for criminal conduct. *Arcara*, 478 U.S. at 700, 707. In *Arcara*, the Erie County Sheriff's Department obtained evidence of solicitation of prostitution on the defendant's premises, a bookstore. *Id.* at 698-99. There was no issue as to whether the materials sold by the defendants were obscene, only whether a New York Public Health Law that defined places of prostitution as public health nuisances and provided for the closing of such buildings for one year was valid. *See id.* at 699-700.

The defendants claimed that the closing of their bookstore would impermissibly interfere with their First Amendment rights to sell books on the premises. *Id.* at 705. The Supreme Court

affect First Amendment activities are subject to First Amendment scrutiny only in certain situations.<sup>231</sup> The Court stated that First Amendment scrutiny is appropriate when expressive conduct leads to the sanctions, or when a statute regulating non-expressive activity has the inevitable effect of singling out those engaged in expressive activity.<sup>232</sup> The Court applied that standard to this case and concluded that although the conduct that drew the legal remedy, racketeering committed through obscenity violations, is expressive, obscenity can be regulated without violating the First Amendment.<sup>233</sup> The Court, therefore, upheld Alexander's conviction and subsequent RICO forfeitures.<sup>234</sup>

Justice Kennedy, joined by Justices Blackmun, Stevens and Souter, dissented.<sup>235</sup> Justice Kennedy called the majority opinion a "grave repudiation of First Amendment principles."<sup>236</sup> According to Justice Kennedy, bookstore owners would now need to choose carefully each item in their inventory to avoid risk to the entire business.<sup>237</sup> This threat, the dissent stated, undermines free speech and press principles essential to personal freedom.<sup>238</sup> Kennedy conceded that the state does not violate the First Amendment by regulating and punishing obscenity.<sup>239</sup> He stated, however, that the situation is different where the destruction of protected materials and the means for their distribution is involved.<sup>240</sup>

The fundamental defect in the majority opinion, Kennedy wrote, is its failure to distinguish between RICO forfeitures and traditional punishments such as jail terms and fines.<sup>241</sup> Kennedy stated that RICO forfeiture provisions are different from traditional punishments because Congress specifically designed them to be different.<sup>242</sup> He stated

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rejected this argument. *Id.* at 707. It noted that the sexual activity occurring in this case exhibits absolutely no element of protected expression. *Id.* at 705. The *Arcara* Court stated that the defendants were free to sell the same materials once sold in the closed bookstore at another location. *Id.* at 706 n.2.

<sup>231</sup> *Alexander*, 113 S. Ct. at 2774-75 (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *United States v. O'Brien*, 391 U.S. 367 (1968)).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 2775.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 2776 (Kennedy, J., dissenting). Justice Souter concurred in the judgment but joined part of Kennedy's dissent. *Id.* Although Souter agreed with the majority that RICO's forfeiture provisions were not prior restraints, he agreed with the dissent that the First Amendment forbids the forfeiture of expressive materials unless they have been judged obscene. *Id.*

<sup>236</sup> *Alexander*, 113 S. Ct. at 2776 (Kennedy, J., dissenting).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 2777.

<sup>240</sup> *Id.*

<sup>241</sup> *Alexander*, 113 S. Ct. at 2777 (Kennedy, J., dissenting).

<sup>242</sup> *Id.*

that RICO's forfeiture penalties are novel both because of their punitive character and unprecedented sweep.<sup>243</sup> Traditional civil in rem forfeiture has been limited to contraband, articles unlawfully used or, at its broadest, proceeds from unlawful activity.<sup>244</sup> RICO, however, mandates forfeiture of the defendant's interest in, and property affording him a source of influence over, the RICO enterprise.<sup>245</sup> Furthermore, RICO originally targeted only offenses endemic to organized crime, but Congress amended it in 1984 to include obscenity as a predicate offense.<sup>246</sup> The result of adding a speech offense to a statute designed to attack a different category of criminal conduct, Kennedy argued, was to place any business dealing in sexually explicit material in danger of being shut down by the Government.<sup>247</sup> Kennedy concluded, therefore, that the constitutional concerns raised by RICO's forfeiture provisions differed from those raised by traditional punishments.<sup>248</sup>

The dissent criticized the majority's analysis of Alexander's prior restraint argument.<sup>249</sup> Kennedy stated that Congress designed RICO's forfeiture provisions to destroy an entire speech business, including protected titles.<sup>250</sup> Thus, the provisions deprive the public of access to lawful expression.<sup>251</sup> The dissent described this result as "censorship all too real."<sup>252</sup> Kennedy conceded the distinction between prior restraint and subsequent punishment.<sup>253</sup> Nevertheless, he stated that the distinction is not precise, and certainly does not support the destruction of a speech business as punishment for past expression.<sup>254</sup> Instead, he argued that the Court's prior restraint cases show the adaptability of this concept to protect against new threats to speech.<sup>255</sup>

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<sup>243</sup> *Id.* at 2778.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Alexander*, 113 S. Ct. at 2778 (Kennedy, J., dissenting).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* The dissent questioned the majority's assertion that *Fort Wayne Books* and *Arcara* dispose of Alexander's challenge. *Id.* Kennedy argued that the Court in *Fort Wayne Books* did not consider the implications of extensive penal forfeitures, including the destruction of protected expressive materials. *Id.* The dissent further argued that although *Fort Wayne Books* conceded that some self-censorship is unavoidable in obscenity regulation, the real issue in *Alexander* is the pervasive danger of government censorship. *Id.* This issue, Kennedy stated, was not considered in *Fort Wayne Books*. *Id.*

<sup>249</sup> *Id.* at 2779.

<sup>250</sup> *Id.*

<sup>251</sup> *Alexander*, 113 S. Ct. at 2779 (Kennedy, J., dissenting).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*



Kennedy also questioned the utility of the distinction.<sup>256</sup> He suggested that, in one sense, all criminal obscenity statutes are prior restraints because they induce a book seller or speaker to exercise caution to avoid violating the law.<sup>257</sup> Kennedy argued that in American legal history the courts have extended protection from prior restraints to invalidate government actions that, although deviating from the classic form of prior restraint, pose many of the same dangers to First Amendment rights.<sup>258</sup>

The dissent stated that the Court consistently has adopted a "speech-protective" definition of prior restraint when the Government attempts to regulate future speech as punishment for a speaker's past speech violations.<sup>259</sup> Kennedy rejected the majority's view that the definition of prior restraint only includes those measures that impose a legal impediment on a speaker's ability to engage in future expressive activity.<sup>260</sup> Kennedy noted that, in the past, the Supreme Court held that mere warnings from the Government that materials were obscene constituted prior restraint.<sup>261</sup> If mere warnings were a prior restraint, Kennedy reasoned, certainly physical destruction of an entire speech business, including presumably protected materials, should also be condemned.<sup>262</sup> As a result of the majority's holding, Kennedy argued, any bookstore could be forfeited as punishment for even a single obscenity conviction.<sup>263</sup> He urged that, assuming the constitutionality of RICO's forfeiture provisions when applied to non-speech violations, the constitutional analysis must be different when the forfeiture is imposed for violations of obscenity laws.<sup>264</sup>

RICO's forfeiture provisions, Kennedy maintained, certainly were not designed for sensitive and exacting application.<sup>265</sup> Instead, those provisions have the effect of condemning and destroying books and films not for their own content, but for the content of their owner's prior speech.<sup>266</sup> Kennedy argued that the law simply does not permit

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<sup>256</sup> *Alexander*, 113 S. Ct. at 2779 (Kennedy, J., dissenting).

<sup>257</sup> *Id.* at 2780.

<sup>258</sup> *Id.* at 2781. *Near v. Minnesota ex rel. Olson*, Kennedy argues, supports this proposition. *Id.* The *Near* Court invalidated the statutory scheme in question because the publisher was subjected to active governmental intervention for the control of future speech based on its past wrongs. See *id.* See *supra* notes 94-103 for a discussion of *Near*.

<sup>259</sup> *Alexander*, 113 S. Ct. at 2781-82 (Kennedy, J., dissenting).

<sup>260</sup> *Id.* at 2782.

<sup>261</sup> *Id.* Kennedy referred to *Bantam Books, Inc. v. Sullivan* as an illustration. *Id.*; see *supra* notes 104-08.

<sup>262</sup> *Alexander*, 113 S. Ct. at 2782 (Kennedy, J., dissenting).

<sup>263</sup> *Id.* at 2783.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 2783-84.

the Government to restrict future speech in this way.<sup>267</sup> RICO's forfeiture provisions, the dissent concluded, provides prosecutors "not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use."<sup>268</sup>

The dissent argued that the majority misunderstood the fundamental difference between punishment imposed for speech offenses and punishment imposed for other crimes.<sup>269</sup> Kennedy argued that if the Government seeks forfeiture of a bookstore because of its owner's drug offenses, there exists little reason to speculate that the sanction is the result of the Government's disapproval of the bookstore's contents.<sup>270</sup> However, where the sanction is the result of previous speech offenses, Kennedy stated, the Government not only punishes those offenses, but also deters the speech-related business itself.<sup>271</sup> This threat of censorship, he argued, justifies the imposition of First Amendment protection and requires that the forfeiture of Alexander's inventory and distribution facilities be held invalid.<sup>272</sup>

In sum, the *Alexander* majority upheld RICO's post-trial forfeiture provisions as valid subsequent punishments for criminal violations, rather than overturning the provisions as unconstitutional prior restraints on speech.<sup>273</sup> The Court conceded that RICO's strict forfeiture provisions, when applied to an expressive business such as a sexually explicit bookstore, would lead to some self-censorship of constitutionally protected speech.<sup>274</sup> The Court concluded, however, that this self-censorship also would occur when a defendant faces severe prison sentences or fines.<sup>275</sup> RICO's forfeiture provisions, therefore, lead to no greater a chilling effect than other criminal punishments, and are constitutional.<sup>276</sup>

The Court also dismissed the argument that protected, non-obscene assets should be spared from RICO's forfeiture provisions.<sup>277</sup> The Court reasoned that non-obscene assets are subject to forfeiture not because of their expressive nature, but because they are related directly to a racketeering enterprise.<sup>278</sup> The Court, therefore, refused to carve

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<sup>267</sup> *Alexander*, 113 S. Ct. at 2784 (Kennedy, J., dissenting).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Alexander*, 113 S. Ct. at 2784 (Kennedy, J., dissenting).

<sup>273</sup> *Id.* at 2770-71.

<sup>274</sup> *Id.* at 2774.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Alexander*, 113 S. Ct. at 2770-71.

<sup>278</sup> *Id.* at 2772.

out an exception to RICO when the racketeering enterprise is a business dealing in expressive materials.<sup>279</sup>

#### IV. THE FLAWS IN THE *ALEXANDER* DECISION

The majority opinion in *Alexander* is flawed in several fundamental ways. By taking a formalistic approach to analyzing RICO, the Court ignored the practical results of that statute's forfeiture provisions and, as a result, contradicted its prior jurisprudence. The Court stated that a RICO forfeiture order is not a prior restraint because it does not forbid Alexander from engaging in any expressive activities in the future, nor does it require him to obtain prior judicial approval for any expressive activities.<sup>280</sup> According to the Court, the RICO forfeiture only deprives Alexander of assets directly related to his previous racketeering activity.<sup>281</sup> The Court stated that because there exists no legal impediment to Alexander's ability to open new stores, RICO forfeitures differ from the prior restraints in cases like *Near* and *Vance*.<sup>282</sup> In *Near*, the trial court forbade the defendants from publishing, circulating or possessing any edition of their newspaper.<sup>283</sup> The Supreme Court struck down this order as an unconstitutional prior restraint.<sup>284</sup> *Vance* involved two Texas nuisance statutes under which a court could enjoin indefinitely a theater's showing of non-obscene films upon Government demonstration that obscene films had been shown at the same theater.<sup>285</sup> The Supreme Court struck down the statutes as impermissible prior restraints.<sup>286</sup>

Although it may be true that Alexander is able to start a new business, the fact remains that the Court has restrained his future expression through the forfeited business.<sup>287</sup> This result contradicts previous Supreme Court holdings that the government may not abridge a citizen's freedom of expression in one place "on the plea that it may be exercised in some other place."<sup>288</sup> The Court's jurisprudence invalidates the argument that RICO's forfeiture provisions cannot violate the First Amendment simply because those provisions do not perma-

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<sup>279</sup> See *id.* at 2773.

<sup>280</sup> *Id.* at 2771.

<sup>281</sup> *Id.*

<sup>282</sup> *Alexander*, 113 S. Ct. at 2771.

<sup>283</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 704-05 (1931).

<sup>284</sup> See *id.* at 723.

<sup>285</sup> *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309-10 nn.1-2 (1980).

<sup>286</sup> *Id.* at 314.

<sup>287</sup> See O'Donnell, *supra* note 18, at 1118.

<sup>288</sup> See *id.*

nently enjoin a defendant from starting a new business to replace the forfeited one. If this argument were valid, it would lead to ludicrous results. Taken to an extreme, the argument would allow the government to justify banning the sale of a newspaper in a particular state because the papers could be sold in another state.<sup>289</sup>

Furthermore, one commentator has argued that a business owner like Alexander is not free to conduct his business elsewhere.<sup>290</sup> If a bookstore owner starts a business in a new location, the state may consider that business as derived from the proceeds of past criminal activity and therefore subject it to forfeiture.<sup>291</sup> Thus, the Court's reasoning that RICO legally does not bar Alexander from opening new stores is flawed. In fact, it is possible that, should Alexander open a new store, the business would be subject to forfeiture. The Supreme Court's reasoning also is flawed because it ignores the reality that most defendants like Alexander have forfeited nearly all of their assets and simply do not have the resources to start a new business. Thus, the practical effect of a RICO forfeiture is to bar permanently the defendant from starting an expressive business in the future, regardless of whether there exists a legal impediment forbidding him from doing so.

The Court also stated that RICO's forfeiture provisions are not prior restraints because they do not consider the expressive nature of the forfeited materials.<sup>292</sup> Alexander's assets were forfeited not because they were suspected of being obscene, the Court argued, but because they were directly related to past racketeering violations.<sup>293</sup> Thus, the Court concluded, the fact that RICO does not consider the expressive or non-expressive nature of the assets forfeited insulates it from First Amendment attack.<sup>294</sup>

This reasoning ignores the Court's previous decisions which hold that prior restraints are not limited to content-based regulations.<sup>295</sup> A prior restraint may exist even if it is oblivious to the content of the speech it is restricting.<sup>296</sup> In *Near* the Supreme Court stated that the Constitution protects citizens from prior restraints.<sup>297</sup> The *Near* Court did not say that only prior restraints that are conscious of the speech

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<sup>289</sup> See *id.* at 1118 n.120.

<sup>290</sup> Marin, *supra* note 50, at 442.

<sup>291</sup> *Id.*

<sup>292</sup> *Alexander*, 113 S. Ct. at 2772.

<sup>293</sup> *Id.*

<sup>294</sup> See *id.*

<sup>295</sup> See Marin, *supra* note 50, at 442.

<sup>296</sup> See *id.*

<sup>297</sup> *Near v. Minnesota ex rel Olson*, 283 U.S. 697, 713 (1931).

they restrict are unconstitutional.<sup>298</sup> Furthermore, prior restraints are disfavored precisely because they do not consider the content of the expression they are suppressing. They are blanket prohibitions that prevent expression from entering the marketplace of ideas before a judicial determination of the content of those expressions.<sup>299</sup> Thus, the fact that RICO does not consider the expressive nature of forfeited items does not immunize it from First Amendment attack.

The greatest error in the majority's reasoning is that it ignored a fundamental tenet of First Amendment jurisprudence that the Court should look through the form of a statute and evaluate its practical impact on free speech.<sup>300</sup> The Court in *Alexander* ignored RICO's effect on free speech and instead followed a formalistic approach designed to uphold its provisions. By doing so, the Court contradicted its earlier decisions in this area. For example, the Supreme Court in *Near*, in evaluating an injunction against a newspaper, stated that a court must analyze an alleged prior restraint according to its operation and effect upon free speech.<sup>301</sup> The *Near* Court "cut through mere details of procedure" and evaluated the practical consequences of the injunction in question.<sup>302</sup> The *Alexander* Court, however, refused to evaluate the practical consequences of RICO's forfeiture provisions, and instead relied on "mere details of procedure." For example, when the Court argued that RICO forfeitures are not prior restraints because they impose no legal impediment on Alexander's ability to open new businesses, it ignored RICO's operation and effect on free speech.<sup>303</sup> As argued above, the practical consequence of RICO's forfeiture provisions is to bar permanently a defendant from starting a new business to replace the forfeited one.

In the past, the Supreme Court has followed the *Near* mandate and looked beyond the mere form of a statute to evaluate its impact on free speech.<sup>304</sup> For example, in *Bantam Books, Inc. v. Sullivan*, the Court struck down a statute, as an unconstitutional prior restraint, that empowered a state commission to warn book sellers that certain titles could be obscene, thus implying that criminal prosecution could follow if the titles were not removed.<sup>305</sup> Following the *Near* mandate, the Court

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<sup>298</sup> See Marin, *supra* note 50, at 442.

<sup>299</sup> See O'Donnell, *supra* note 18, at 1113.

<sup>300</sup> See *Near*, 283 U.S. at 713.

<sup>301</sup> See *id.* at 708.

<sup>302</sup> See *id.* at 713.

<sup>303</sup> See *Alexander*, 113 S. Ct. at 2771.

<sup>304</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

<sup>305</sup> *Id.* at 71.

stated that it would look through form to the substance of restrictions and recognize that even informal censorship may sufficiently inhibit free speech to warrant injunctive relief.<sup>306</sup>

If the *Alexander* Court's reasoning were applied to *Bantam Books*, the Court undoubtedly would have upheld the statute. The *Alexander* majority held that RICO's forfeiture provisions are not prior restraints because they impose no legal impediment prohibiting a defendant from opening a new business to replace the forfeited one.<sup>307</sup> In *Bantam Books*, however, the state commission had no enforcement powers whatsoever.<sup>308</sup> It merely sent letters to bookstore owners warning them that books in their inventory may be obscene.<sup>309</sup> Using the majority's reasoning in *Alexander*, the statute in *Bantam Books* could never result in an unconstitutional prior restraint because it could never impose a legal impediment prohibiting bookstore owners from selling any book they chose. Nevertheless, the *Bantam* Court considered the practical impact of the statute and held that it violated the Constitution.

An evaluation of the practical impact of RICO's forfeiture provisions on free speech leads inescapably to the conclusion that those provisions are unconstitutional prior restraints. First, as argued above, the typical defendant subject to a RICO forfeiture practically is precluded from operating an expressive business in the future, despite the fact that he legally is allowed to do so. More importantly, though, the use of obscenity as a RICO predicate act changes the effect of the statute's forfeiture provisions. RICO forfeitures pursuant to obscenity violations differ from other predicate act violations because of the amorphous definition of obscenity.<sup>310</sup> The Supreme Court has encountered difficulty defining obscenity and even the current *Miller* definition is vague.<sup>311</sup> The most troublesome aspect of *Miller* is that it provides for a different definition of obscenity in each community. It is the difficulty in defining obscenity that makes its violation different from other RICO predicate acts and leads to prior restraints.

Although the Supreme Court clearly has had difficulty defining obscenity, a bookstore owner must do so each day to avoid selling unprotected materials. This task is an impossibility because something is not obscene until a court, applying the standards of the community, so determines. Nevertheless, the bookstore owner must decide in ad-

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<sup>306</sup> *Id.* at 67.

<sup>307</sup> *Alexander*, 113 S. Ct. at 2771.

<sup>308</sup> *Bantam Books*, 372 U.S. at 67.

<sup>309</sup> *Id.* at 61.

<sup>310</sup> See Melnick, *supra* note 43, at 432.

<sup>311</sup> See *supra* note 56 in which Justice Stewart is quoted as calling obscenity "indefinable."

vance, using a subjective standard, what might be obscene and what might be protected speech. One presumes that individuals committing other RICO predicate acts, like murder or drug trafficking, are relatively certain that their actions are illegal. These individuals may, therefore, consciously avoid engaging in illegal RICO predicate activity to avoid RICO forfeitures. Yet the inherent confusion surrounding the definition of obscenity makes it impossible for a bookstore owner to know if she is violating the law and thus risking her entire business.<sup>312</sup>

The practical result of this uncertainty is that many bookstore owners will remove any questionable titles from their inventory rather than risk losing their entire business.<sup>313</sup> This action is prudent given the fact that if even a small portion of a business' inventory is obscene, the entire business could be lost. For example, in *Pryba* where only \$105.30 worth of sales were obscene, the court ordered the forfeiture of twelve businesses, with sales exceeding \$2 million, and related assets.<sup>314</sup> In *Alexander*, the Court determined that only four magazines and three video tapes, out of an enormous business, were obscene.<sup>315</sup> Nevertheless, Alexander forfeited his entire business, was sentenced to jail and forfeited nearly \$9 million in assets.<sup>316</sup> Thus, the practical impact of RICO forfeitures is to create an unconstitutional prior restraint on speech by forcing those in expressive businesses to censor themselves to avoid forfeiture of their business.

The *Alexander* majority maintained that any strict punishment, not just RICO forfeitures, can result in self-censorship.<sup>317</sup> RICO forfeitures are different from other punishments, however, because Congress specifically designed them to attack the economic base of the business and sever the connection between the defendant and the business.<sup>318</sup> RICO forfeitures also are different from traditional penalties because they are mandatory, they provide for a long list of forfeitable items and they are permanent, unlike other injunctions. For example, a typical padlock order under a nuisance abatement law provides for the closure of an adult bookstore for one year and the ban of all personal property from the premises.<sup>319</sup> A majority of courts have held that such orders

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<sup>312</sup> See Melnick, *supra* note 43, at 432.

<sup>313</sup> See *id.* at 432-33.

<sup>314</sup> *United States v. Pryba*, 900 F.2d 748, 753 (4th Cir. 1990).

<sup>315</sup> See *Alexander*, 113 S. Ct. at 2770.

<sup>316</sup> See *id.*

<sup>317</sup> See *id.* at 2774.

<sup>318</sup> See *id.* at 2778.

<sup>319</sup> See Marin, *supra* note 50, at 438.

are prior restraints.<sup>320</sup> RICO imposes even more severe sanctions because it permits seizure orders of indefinite duration and provides for permanent forfeitures.<sup>321</sup> In fact, RICO forfeitures are even greater infringements than the typical prior restraint like the one in *Near*.<sup>322</sup> The defendant in *Near* could have had the injunction lifted if he demonstrated that future issues of the newspaper would not be defamatory. In a RICO forfeiture, the defendant does not have this option because the mandatory forfeitures take away the defendant's expressive business entirely.<sup>323</sup> Thus, even if a defendant's future expression would not be obscene, he has no opportunity to demonstrate this fact because his business no longer exists. In sum, an examination of the practical impact of RICO's forfeiture provisions leads inescapably to the conclusion that they are unconstitutional prior restraints.

#### V. PROPOSED LIMIT ON THE SCOPE OF RICO FORFEITURES

The *Alexander* majority stated that RICO's forfeiture provisions were not prior restraints because they rested on a nexus between the forfeited assets and Alexander's racketeering violations.<sup>324</sup> The Court stated that the forfeited assets were "directly related" to Alexander's past racketeering activity.<sup>325</sup> This nexus, the Court argued, distinguished *Alexander* from other prior restraint cases in which the Government restrained expressive material prior to judicial determination that the materials were obscene.<sup>326</sup> In those cases, the content of the materials prompted their forfeiture because they were suspected of being obscene.<sup>327</sup> In *Alexander*, however, the content of the forfeited materials was irrelevant.<sup>328</sup> The Court argued that the sole motive for the assets forfeiture was their link to the racketeering enterprise.<sup>329</sup>

It is debatable whether all of Alexander's forfeited assets were "directly related" to his racketeering enterprise, given that four obscene magazines and three obscene video tapes caused the forfeiture of \$9 million in assets. Even if this point is conceded, the Court's argument still ignores important constitutionally suspect aspects of

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<sup>320</sup> See *id.*

<sup>321</sup> See *id.*

<sup>322</sup> See O'Donnell, *supra* note 18, at 1117.

<sup>323</sup> See *id.*

<sup>324</sup> *Alexander*, 113 S. Ct. at 2772.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Alexander*, 113 S. Ct. at 2772.



RICO's forfeiture provisions. RICO specifically provides for the forfeiture of not only those assets "directly related" to the racketeering enterprise, but also assets even "remotely connected with the offense."<sup>330</sup> The statute mandates the forfeiture of "any proceeds which the person obtained, *directly or indirectly*, from racketeering activity . . . ."<sup>331</sup> Further exacerbating the Court's error is the fact that RICO *mandates* the forfeiture of all of these assets.<sup>332</sup> Therefore, neither courts nor prosecutors have discretion to spare from forfeiture those assets only remotely related to the racketeering violations.

Clearly, the Court has approved of Alexander's forfeitures because it decided they were directly related to the racketeering enterprise. Yet the Court was careful to uphold RICO's forfeiture provisions only on the specific facts of *Alexander*. The Court failed to discuss how it would rule if it found forfeited assets were related only indirectly to the racketeering enterprise. RICO mandates that if such assets exist, they must be forfeited. Thus, the Court did not deal with the RICO forfeiture provisions that pose the greatest potential threat to the Constitution. The Court passed on an opportunity to create a standard to determine how directly related to the racketeering enterprise assets must be to be forfeitable.

A formal nexus requirement may offer one solution. Such a requirement would delineate the parameters of forfeitable assets, thus giving meaning to the words "directly and indirectly" as contained in RICO.<sup>333</sup> Such a requirement also would have allowed the Court to balance properly Congress's intent in passing RICO with concerns that broad forfeiture provisions, pursuant to speech violations, pose special risks that do not exist when non-speech violations are involved. The Ninth Circuit in *Barr* laid out one possible nexus requirement. That court eliminated from RICO forfeiture those assets that are uninvolved or only marginally involved in the racketeering business.<sup>334</sup> The court stated that forfeiture of assets is not appropriate when those assets are part of an essentially legitimate business that was involved in only minor RICO obscenity violations resulting in relatively little illegal profit in proportion to the business' legitimate income.<sup>335</sup>

Under this definition, the four magazines and three video tapes the jury found obscene in *Alexander* certainly would not have justified

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<sup>330</sup> *Adult Video Ass'n v. Barr*, 960 F.2d 781, 790 (9th Cir. 1992).

<sup>331</sup> 18 U.S.C. § 1963(a)(3) (1988) (emphasis added).

<sup>332</sup> *Id.* § 1963(a).

<sup>333</sup> *See id.*

<sup>334</sup> *Barr*, 960 F.2d at 791.

<sup>335</sup> *Id.*

the forfeiture of \$9 million in assets. Nor would the \$105.30 of obscene materials in *Pryba* justify the forfeiture of twelve businesses and other property. RICO forfeitures, however, would still be capable of destroying criminal enterprises without destroying large, legitimate businesses because of relatively minor obscenity violations.

The Supreme Court has left itself some flexibility to strike down a RICO forfeiture of assets only remotely related to the racketeering enterprise. The Court conspicuously ignored the Ninth Circuit's ruling in *Barr* that provided a workable standard limiting the forfeitability of assets only remotely related to the illegitimate business. The *Alexander* Court simply stated that the forfeited assets were "directly related" to Alexander's past racketeering violations.<sup>336</sup> By not even addressing what "directly related" means and by ignoring RICO's forfeiture provisions that mandate forfeiture of assets indirectly related to the racketeering enterprise, the Court has left the door open to challenges of RICO's forfeiture provisions in the future.

In sum, the Supreme Court in *Alexander* took a formalistic approach to its analysis of RICO's forfeiture provisions and ignored the statute's practical result. The Court failed to realize that RICO's forfeiture provisions are, in reality, a permanent injunction that bars defendants from starting an expressive business. The fact that RICO is oblivious to the expressive nature of the forfeited assets should not insulate it from First Amendment scrutiny because Supreme Court jurisprudence holds that prior restraints are not limited to content-based regulations. Furthermore, the amorphous definition of obscenity makes it virtually impossible for a bookstore owner to know when she might run afoul of the law and thus become subject to RICO's forfeiture provisions. Given the grave consequences of those provisions, the Court in *Alexander* should have struck down the provisions as unconstitutional prior restraints on speech. At the very least, the Court should have limited the quantum of forfeitable assets by defining how related to the racketeering enterprise the assets must be to be eligible for forfeiture. By not doing so, the Court has left the door open for future attacks on RICO's forfeiture provisions.

## VI. CONCLUSION

The Supreme Court's holding in *Alexander v. United States* represents a significant diminution of First Amendment rights afforded to owners of expressive businesses and the general public. By upholding

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<sup>336</sup> See *Alexander*, 113 S. Ct. at 2772.

RICO's broad and severe post-trial forfeiture provisions, the Court has sanctioned a wide range of potential First Amendment abuses. Entire expressive businesses may be forfeited because of insignificant violations of poorly-defined obscenity laws. Bookstore owners, unable to define obscenity and unwilling to risk their entire businesses, surely will censor themselves and thus deprive the public of access to protected expression. The Court justified the forfeitures in *Alexander* by asserting that the forfeited assets were "directly related" to the racketeering enterprise. What the Court failed to do, however, is define what "directly related" means and to address how it would rule if it found forfeited assets were only indirectly related to the racketeering enterprise. Because RICO mandates forfeiture of both categories of assets, and because the *Alexander* Court carefully limited its decision to the facts of the case, the possibility exists that a defendant could mount a successful attack on RICO in the future.

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